Taiwan Chief Precision Technology Sdn Bhd (formerly known as Li Yo Electronics Sdn Bhd) v Tenaga Nasional Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCVC)-3148–12 OF 2011
RAMLY ALI, ZAHARAH IBRAHIM AND ANANTHAM KASINATHER JJCA
29 MAY 2013

Civil Procedure — Appeal — Appeal against judgment of High Court — Electricity supply — Tampering of current transformer terminal at meter recording for supply of electricity — Whether there was tampering — Whether plaintiff owed outstanding payment — Appeal against counterclaim and quantum — Electricity Supply Act 1990 s 34

The appellant ('the plaintiff') operated an electronics factory, and received its supply of electricity from the respondent (' the defendant'). Through a notice, the defendant informed the plaintiff that due to the tampering of the current transformer terminal ('CTT') at the meter recording the supply of electricity to the factory, the plaintiff was required to pay the amount of RM294,297.89 within 14 days from the date of the notice. However, the plaintiff averred that it did not owe any outstanding payment to the defendant. The plaintiff commenced the present suit in the High Court praying for a declaration that it did not owe the sums claimed by the defendant. The defendant counterclaimed for that same disputed amount on the basis that there was tampering which resulted in the meter failing to record the actual amount of electricity supplied to the factory. The High Court dismissed the plaintiff's claim and allowed the defendant's counterclaim. Hence, the present appeal. The plaintiff appealed against the whole of the said decision, ultimately challenging the decision on the counterclaim and the quantum.

Held, allowing the appeal:

(1) The High Court judge had dealt sufficiently in his judgment and the court was satisfied that His Lordship was correct in arriving at the finding that the CTT had been tampered with (see paras 16–17).

(2) There was nothing in s 38 of the Electricity Supply Act 1990 ('Act') to justify the learned High Court judge taking the approach that the burden on the plaintiff to displace the prima facie evidence of the s 38 statement must take the form of showing manifest error. What the learned High Court judge had mistakenly done was to 'import' the now ubiquitous clause in the various banking facility/guarantee documents which stated the agreement of the borrower/guarantor that the amount stated in the

bank officer/manager's statement was conclusive evidence of the amount outstanding unless manifest error is shown. The relevant provision of sub-s 38(4) of the Act was not a 'conclusive evidence' clause which could only be displaced by evidence of manifest error (see paras 21–22).

(3) What needed to be determined by the High Court was whether there was any evidence that balanced or outweighed the prima facie evidence of the defendant's s 38 statement. That evidence need not necessarily be manifest error on the face of the s 38 statement. It could take the form of evidence adduced by the plaintiff or even evidence adduced by the defendant itself (see para 26).

(4) As the defendant's counterclaim was based upon the prima facie evidence of the s 38 statement, when that prima facie evidence was no longer capable of proving the amount claimed in the counterclaim on the balance of probabilities, the counterclaim must be dismissed by the High Court and consequently the plaintiff's claim must be allowed (see para 44).

[Bahasa Malaysia summary

Perayu ('plaintif') mengendalikan kilang elektronik, dan menerima bekalan elektrik daripada responden ('defendan'). Melalui notis, defendan memberitahu plaintif bahawa akibat daripada pengusikan terminal *current transformer terminal* ('CTT') pada meter yang merekodkan bekalan elektrik ke kilang, plaintif dikehendaki membayar sejumlah RM294,297.89 dalam masa 14 hari dari tarikh notis tersebut. Plaintif walau bagaimanapun berhujah bahawa ia tidak berhutang apa-apa bayaran tertunggak kepada defendan. Plaintif memulakan tindakan ini di Mahkamah Tinggi memohon untuk perisytiharan bahawa ia tidak berhutang jumlah yang dituntut oleh defendan. Defendan menuntut balas untuk jumlah yang dipertikaikan atas asas bahawa terdapat pengusikan yang mengakibatkan meter gagal untuk merekodkan jumlah sebenar elektrik yang dibekalkan ke kilang. Mahkamah Tinggi menolak tuntutan plaintif dan membenarkan tuntutan balas defendan. Maka rayuan ini. Plaintif merayu terhadap kesemua keputusan tersebut, pada asasnya mencabar keputusan atas tuntutan balas dan kuantum.

Diputuskan, membenarkan rayuan:

(1) Hakim Mahkamah Tinggi telah merumuskan dengan secukupnya dalam penghakimannya dan mahkamah berpuas hati bahawa Yang Arif adalah betul dalam mencapai dapatan bahawa CTT telah diusik (lihat perenggan 16–17).

(2) Tidak terdapat apa-apa di dalam s 38 Akta Bekalan Elektrik 1990 ('Akta') untuk menjustifikasikan hakim Mahkamah Tinggi yang bijakasana mengambil pendekatan bahawa beban ke atas plaintif untuk menggantikan keterangan prima facie penyataan s 38 mesti

menunjukkan kesilapan yang jelas. Apa yang hakim Mahkamah Tinggi yang bijaksana telah tersalah buat adalah untuk 'import' klausa yang sedia ada sekarang ke dalam beberapa kemudahan perbankan/dokumen jaminan yang menyatakan perjanjian peminjam/penjamin bahawa jumlah yang dinyatakan di dalam penyataan pegawai bank/pengurus adalah keterangan konklusif jumlah yang tertunggak kecuali kesilapan ditunjuk. Peruntukan relevan sub-s 38(4) Akta bukan klausa 'conclusive evidence' yang hanya boleh digantikan dengan keterangan kesilapan yang jelas (lihat perenggan 21–22).

(3) Apa yang perlu ditentukan oleh Mahkamah Tinggi adalah sama ada terdapat apa-apa keterangan yang mengimbangkan atau melebihi keterangan prima facie penyataan s 38 defendan. Keterangan tersebut tidak semestinya kesilapan yang besar atas penyataan s 38. Ia boleh menjadi keterangan yang dikemukakan oleh plaintif ataupun keterangan yang dikemukakan oleh defendan sendiri (lihat perenggan 26).

(4) Memandangkan tuntutan balas defendan berdasarkan keterangan prima facie penyataan s 38, apabila keterangan prima facie tidak dapat membuktikan jumlah yang dituntut di dalam tuntutan balas atas imbangan kebarangkalian, tuntutan balas tersebut mesti ditolak oleh Mahkamah Tinggi dan akhirnya tuntutan plaintif mesti dibenarkan (lihat perenggan 44).]

Notes

For cases on appeal against judgment of High Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 800–803.

Cases referred to

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, Intervener) [2010] 2 MLJ 285; [2010] 2 CLJ 925, FC (folld)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (folld)

Len Min Kong v United Malayan Banking Corp Bhd and another appeal [1998] 2 MLJ 478, CA (folld)

Legislation referred to

Electricity Supply Act 1990 s 38, 38(4)

Rules of the High Court 1980 O 14

Appeal from: NCVC No 23–103 of 2011 (High Court, Johor Bahru)

Gideon Tan (Alfred Lai and KM Ong with him) (KM Ong, Lee & Co) for the appellant.

Abdul Rahim Ali (Shahrizat Rashid & Lee) for the respondent.

Zaharah Ibrahim JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] The plaintiff/appellant ('the plaintiff') operated an electronics factory, and received its supply of electricity from the defendant/respondent ('the defendant').

[2] By notice dated 17 September 2010, the defendant informed the plaintiff that due to the current transformer terminal ('CTT') at the meter recording the supply of electricity to the factory having been tampered with, the plaintiff was required to pay the amount of RM294,297.89 within 14 days from the date of the notice, being the amount which should have been paid had the supply been correctly recorded if there had not been any tampering.

[3] A notice of demand was also sent to the plaintiff by the defendant through its solicitors.

[4] The plaintiff disputed the claim and contended that it did not owe any outstanding payment to the defendant for the electricity supplied to the factory.

[5] The plaintiff commenced this suit praying for a declaration that it did not owe the sums claimed by the defendant, and an order that the defendant was to be restrained from disconnecting the electricity supply to the factory; and if supply was disconnected due to the disputed sum, for an order that the defendant reconnect the supply.

[6] The defendant countered the plaintiff's move by filing a counterclaim for that same disputed amount on the basis that there was tampering which resulted in the meter failing to record the actual amount of electricity supplied to the factory.

[7] The High Court of Malaya at Johor Bahru dismissed the plaintiff's claim and allowed the defendant's counterclaim.

[8] The plaintiff appealed against the whole of that decision. We heard the appeal on 21 March 2012 and allowed the appeal.

[9] We now give our grounds for that decision.

HIGH COURT DECISION

[10] The learned High Court judge took the position that the claim and counterclaim rest upon the following issues:

(a) whether the CTT had been tampered with; and

(b) whether the defendant was entitled to recover the loss of revenue claimed by the defendant in the counterclaim.

[11] The learned High Court judge found that the defendant had proven on the balance of probabilities that the CCT had been tampered with.

[12] The learned High Court judge then proceeded to look at the statement in exh D5, being a statement issued under s 38 of the Electricity Supply Act 1990 ('ESA') and made the following finding:

> No evidence was produced to show that there was manifest error on the face of the statement. The court is satisfied that the statement is a fair and reasonable estimate of the loss of revenue due to the tampering of the CTT.

[13] The learned High Court judge then proceeded to find in favour of the defendant on the counterclaim and against the plaintiff on the original claim.

THE APPEAL

[14] The same principal issues are the issues before us. However, at the hearing of the appeal, Encik Gideon Tan, learned counsel for the plaintiff, indicated to us that while the notice of appeal is against the whole decision, the plaintiff's real challenge was against the decision on the counterclaim and the quantum.

ANALYSIS OF ISSUES

Issue (1): Whether the CTT was tampered with

[15] The learned High Court judge found that the defendant had proved on the balance of probabilities that the CTT at the meter had been tampered with.

[16] In our view His Lordship had dealt sufficiently in his judgment with the evidence of DW2 and DW3 as well as that of PW1 and PW2.

[17] We are satisfied that His Lordship was correct in arriving at the finding that the CTT had been tampered with.

Issue (2): Whether the defendant was entitled to recover the loss of revenue claimed by the defendant in the counterclaim

The s 38 statement

[18] We note that the learned High Court judge accepted the amount stated on the statement issued by the defendant under s 38 of the Electricity Supply Act 1990 ('ESA') ('s 38 statement') as conclusive evidence of the amount claimed in the counterclaim because, His Lordship said, 'the plaintiff had failed to produce any evidence to show that there was manifest error on the face of the statement'.

[19] The provisions of ('ESA') with regard to the s 38 statement relied upon by the learned high judge are as follows:

> Disconnection of supply of electricity
>
> 38 (1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorized by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.
>
> (1A) Notwithstanding any other provisions in this Act, where a police officer not below the rank of Assistant Superintendent applies to a supply authority or a licensee for the disconnection of the supply of electricity to any premises for a period not exceeding one calendar month under section 21A of the Common Gaming Houses Act'1953 [Act 289], the supply authority or the licensee or any person authorized by the supply authority or the licensee shall immediately disconnect or cause the supply of electricity to be disconnected from those premises.
>
> (2) If the supply of electricity has been disconnected under subsection (1), it shall not be reconnected until the licensee at his discretion gives permission for reconnection:
>
> Provided that the period of disconnection shall not exceed three months.
>
> (2A) Notwithstanding subsection (2), if the supply of electricity has been disconnected under subsection (1A), it shall not be reconnected without the written permission of a police officer not below the rank of Assistant Superintendent.
>
> (3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under subsections 37(1), (3) and (14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

A (4) A written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying —

(a) the amount of loss of revenue or the expenses incurred by the licensee; and

(b) the person liable for the payment thereof,

B *shall be prima facie evidence* of the payment that has to be made by the consumer under subsection (3).

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court. (Emphasis added.)

C

Burden on the plaintiff vis a vis the defendant's s 38 statement

D

[20] There is nothing in s 38 of the Electricity Supply Act 1990 ('ESA') to justify the learned High Court judge taking the approach that the burden on the plaintiff to displace the prima facie evidence of the s 38 statement must take the form of showing manifest error.

E

[21] We can only conclude that what the learned High Court judge had mistakenly done in this case was to 'import' the now ubiquitous clause in the various banking facility/guarantee documents which states the agreement of the borrower/guarantor that the amount stated in the bank officer/manager's F statement is conclusive evidence of the amount outstanding unless manifest error is shown. The decision of the Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 must have played a role in influencing His Lordship to do so.

G **[22]** Unlike such clauses which feature again and again in the various applications under O 14 of the Rules of the High Court 1980 in banking cases, the relevant provision of sub-s 38(4) of the ESA is not a 'conclusive evidence' clause which can only be displaced by evidence of manifest error.

H **[23]** The s 38 statement is 'prima facie evidence'. What does 'prima facie evidence' mean? According to *Halsbury's Laws of England*, (4th Ed), Vol 17 at p 22, para 28:

'Prima facie evidence' means evidence which, if not balanced or outweighed by I other evidence, will suffice to establish a particular contention.

[24] In that same paragraph, the meaning of 'conclusive evidence' is explained as follows:

'Conclusive evidence' means that no contrary evidence will be effective to displace it, unless the so-called conclusive evidence is inaccurate on its face, or fraud can be shown. Conclusive evidence does not mean exclusive evidence.

[25] The term 'manifest error' is another way of saying 'inaccurate on its face'.

[26] In the context of the case before us, what needed to be determined by the High Court was whether there was any evidence that balanced or outweighed the prima facie evidence of the defendant's s 38 statement. That evidence, in our view, need not necessarily be manifest error on the face of the s 38 statement. It can take the form of evidence adduced by the plaintiff or even evidence adduced by the defendant itself.

Did the plaintiff discharge its burden?

[27] In determining whether the plaintiff had discharged its burden, we are aware that we are dealing with a finding of facts.

[28] We are mindful of the fact that the appeal came to us after full trial, with oral evidence having been given by witnesses for both sides and that the trial judge had the advantage of observing and hearing them.

[29] We caution ourselves that as an appellate court we must not disturb the finding of facts of the trial court unless there is sufficient justification to do so.

[30] We are, however, of the view that we are justified in doing so in this case. In arriving at that view, we are guided, among others, by the judgments of the Federal Court in *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, Intervener)* [2010] 2 MLJ 285; [2010] 2 CLJ 925, and in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 as well as the judgment of this court in *Len Min Kong v United Malayan Banking Corp Bhd and another appeal* [1998] 2 MLJ 478.

[31] The date of discovery of the tampering was 2 July 2010. Discovery was made during a routine examination of the CTT and meter. However, the amount claimed in the counterclaim and as stated in the defendant's s 38 Statement was computed from February 2010.

[32] DW2 who examined the CTT and the meter on 2 July 2010 using a portable wiring set found that the range of error in the actual amount of electricity consumed was -69.34%.

[33] DW3, the defendant's manager for the area in which the factory was situated then computed the amount of revenue loss using that percentage, backdating it all the way to February 2010. When asked why February 2010 was used as the starting point for the calculation of the alleged amount of revenue loss, DW3 response was February 2010 was used because there was a big drop in consumption recorded by the meter from 74,000 units when the meter was read on 17 January 2010 to 42,000 units when it was read in February 2010.

[34] During cross-examination, when DW3 was referred to the readings for several months in 2006–2007 and 2009 which showed that electricity consumption for the factory had a history of rising and dropping, DW3's response was:

> A: Ok, because I didn't expect the question. Ok my men would have visited earlier and they couldn't find any irregularity in the system. But the day is like a 02 July, they went there, they have found there is irregularity in the system and they found there is tampering. So we didn't go very further up, we just took the last drop as the reasonable concern. As a customer service also, sorry.

[35] DW3, when asked of the accuracy of the commencement of the tampering, said:

> A: No, if you ask me the accuracy, all these calculation done assumptionly. We do not know when the tamp the electricity started [sic]

[36] DW3's evidence that the basis for choosing to backdate the computation from February 2010 was solely the drop in consumption in the reading for that month from that of the previous month was accepted by the learned High Court judge without evaluating the rest of the evidence, despite taking note of DW3's admission that it was not known when the CTT was tampered with and that his computation was based on an assumption.

[37] The learned High Court judge did not evaluate the rest of the evidence, in particular the electricity bills at pp 146–170 of the appeal record. In our view, we would be remiss in our duty if we also fail to do so.

[38] We note that electricity consumption stated in the bills as having been consumed between 7 August 2010 (after the date of discovery of the tampering and the 'correction' of the meter) and 1 September 2010 (a period of approximately 24 days) was 125,065 units. But for the period of 1 September 2010–1 October 2010, consumption was 78,485 units. From 2 February 2011–1 March 2011, consumption was 72,424 units. These readings do not differ substantially from the reading of 74,000 units when the meter was read

on 17 January 2010, before the 'drop' in February 2010 thus causing the amount counterclaimed to be calculated from February 2010.

[39] If we compare this to consumption for the period from 1 March 2010–1 April 2010 (64,858 units) and the period from 1 April 2010–1 May 2010 (63,752 units), being the period before the discovery of the tampering, it can be seen that the units consumed in the two periods were also not substantially different from the consumption after the discovery of the tampering and after the 'correction', except for the reading on 1 September 2010.

[40] There was indeed a drop to 42,000 units in February, and a sudden spike in the reading on 1 September 2010, but those two readings appear to be exceptions to the trend of consumption for the other months in 2010 and even for those months in the early part of 2011 for which the bills were before the High Court.

[41] Contrary to the learned trial judge's finding that there was no evidence led to counter the prima facie evidence of the s 38 statement, PW1 had in his evidence-in-chief explained that they stopped production in February 2010 due to the Chinese New Year and stepped up production in January. This was not challenged during cross-examination.

[42] He also explained that usage of electricity would depend on orders received. While it was true that the plaintiff did not produce any document to show increase or reduction of orders for the material period, PW1's evidence is not inherently improbable as after all the plaintiff was operating a factory supplying manufactured goods which must be dependent upon orders placed.

FINDING AND DECISION

[43] We are unanimous in our view that there was in fact sufficient evidence to show the absence of any basis for the amount in the s 38 statement of the defendant to be calculated from February 2010. There was sufficient evidence which 'balanced or outweighed' the prima facie evidence of the s 38 statement.

[44] As the defendant's counterclaim was based upon the prima facie evidence of the s 38 statement, we are satisfied that when that prima facie evidence was no longer capable of proving the amount claimed in the counterclaim on the balance of probabilities, the counterclaim must be dismissed by the High Court and consequently the plaintiff's claim must be allowed.

[45] We therefore allow this appeal and set aside the decision and orders of the High Court.

[46] We order fixed costs in the sum of RM10,000 to be paid to the appellant and order that the deposit be refunded.

Appeal allowed with costs of RM10,000.

Reported by Afiq Mohamad Noor